BLANK

PAGE

Office-Supreme Court, U.S.
FILED
NOV 25 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 738.

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,
Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,
Appellees.

On Appeal from the United States District Court for the Western District of Missouri, Central Division.

MOTION TO AFFIRM.

PAUL W. PREISLER,
4274 Shenandoah Avenue,
St. Louis, Missouri 63110,
Attorney for Appellees.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

BLANK

PAGE

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 738.

JAMES C. KIRKPATRICK et al.,
Appellants,

vs.

PAUL W. PREISLER et al.,
Appellees.

On Appeal from the United States District Court for the Western District of Missouri, Central Division.

MOTION TO AFFIRM.

MOTION TO AFFIRM.

Appellees, pursuant to Rule 16 of the Revised Rules of the United States Supreme Court, move the Court to affirm the final judgment and decree sought to be reviewed on appeal on the ground that it is manifest that the questions on which the decision of this cause depend are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE.

The "Statement of the Case" by Appellants in their "Jurisdictional Statement" is adopted with the following additions and corrections.

The facts cited by Appellants in their "Statement of the Case" are correct but incomplete and in the manner presented may result in many misleading impressions, interpretations, and implications.

Thus, as stated by Appellants that in **Preisler v. Secretary of State of Missouri**, 238 F. Supp. 187 (hereinafter cited as **Preisler I)** the District Court held that population differences of 100,000 persons between congressional districts is presumptive malapportionment **(Preisler I**, page 190), however, it must be emphasized the District Court did not set forth this figure as a standard of permissible variance.

Then, in an attempt to excuse the failure of the Legislature to enact a constitutional redistricting act, Appellants cite that the Act complained of was passed in the ". . . political thicket of the legislative process . . ." in the last few minutes just before the constitutionally compulsory adjournment of the legislative session at midnight of June 30, 1965. That the Act was enacted in the last few minutes before final adjournment does not condone its unconstitutionality; the Legislature had the prior six months of the 1965 session in which to contemplate, discuss, prepare, and enact legislation of such importance.

Next, Appellants manipulate the calculations so as to make the differences between district populations appear of lesser value and lesser importance. First, the population differences are compared to the "ideal district" or average district population which makes the differences appear about one-half of the true differences. Second, Appellants calculate the per cent variance of the district population from the average population. Then, Third, the

population of the largest district is compared to the smallest, resulting in a ratio of 1.21 to 1. This ratio represents an actual variance of over 20% (twenty per cent), which is far from equality. Finally, by calculating that each Missouri district contains 10.0% (ten per cent) of the State's population, if absolute equality between districts were achieved, and calculating that the population of the smallest district constitutes 9.03% of the entire population of the State and the largest 10.9%, Appellants try to make it appear that the population differences are insignificant. Actually, the population difference between largest and smallest district is nearly 20% (twenty per cent), an amount not satisfying the constitutional requirements of congressional districting, and was held to be unconstitutional by the District Court in the instant case **(Preisler II)**.

Finally, Appellants make it appear that the instant action (**Preisler II**) is a new and original case challenging for the first time and belatedly the congressional districting in Missouri. **Preisler I** was dismissed without prejudice and Plaintiffs filed a new suit, the instant case (hereinafter referred to as **Preisler II**), in accordance with an agreement between the parties in **Preisler I** made on January 25, 1966, in order that the 1966 elections would not be confused by the uncertainty of possible Court decisions while the elections were in progress. The Court had retained jurisdiction and Plaintiffs had filed a motion for a declaration and injunction. The District Court, therefore, did not need to rule on the question of the conduct of the 1966 elections by the districts of the 1965 Act because that question was not before it after the agreed voluntary dismissal without prejudice. The jurisdiction of the District Court to hear and determine the instant case was not questioned at any time. Cases before courts in various states have uniformly deferred action during and shortly before an electoral process in progress.

ARGUMENT.

The questions presented by Appellants in their "Jurisdictional Statement" are unsubstantial.

The opinion, decision, and judgment of the three-judge District Court being appealed from (cited on pages 16 through 79 of Appellants' "Jurisdictional Statement") extensively and adequately present the principles involved in the cases which have adjudicated the constitutionality of congressional representative districting acts of the several states and, in the instant case **(Preisler II)**, the District Court reaches the appropriate determination and disposition of the instant action concerning the congressional representative districts of the State of Missouri. Appellees agree with the findings of fact, opinion, decision, and judgment of the District Court. The distinctions drawn and the interpretations made by Appellants (in their "Questions Presented", pages 2 and 3, paragraphs 1, 2 and 3 of their "Jurisdictional Statement") by which Appellants seek to counteract the impact of the several cases cited by the District Court are unsubstantial, as the opinion of the District Court reveals (cited on pages 38 through 64 and footnotes thereto, in Appellants' "Jurisdictional Statement").

In seeking guidance from the decided cases for determining how great a difference or variance between districts constitutes a violation of the constitutional requirements, one must be aware of and draw careful distinction between variances allowed by courts in cases on congressional representative districting under the provisions of **Article I, Section 2, of the United States Constitution**, and the variances allowed in cases on the apportioning of the houses of a state legislature under the provisions of the **Fourteenth Amendment to the United States Constitution.** The Fourteenth Amendment cases were decided against a background of the judicial interpretation of

the equal protection clause standard of "invidious discrimination", which standard was developed from cases on a variety of non-electoral subjects. Thus Mr. Justice Douglas, concurring in **Baker v. Carr**, 369 U. S. 186, at page 245, and Mr. Justice Clark, concurring in the same case, at page 253, referred to the applicable equal protection standard of the Fourteenth Amendment in terms of "invidious discrimination", as set forth in the cases cited in these concurring opinions. **Article I, Section 2** is free of any previous judicial interpretation or construction, and a much lower variance of district populations constitutes a violation of the individual citizen's rights under this section than under the amendment.

This Court in **Wesberry v. Sanders**, 376 U. S. 1 (1964), construed **Article I, Section 2 of the United States Constitution** in part, at page 7, saying:

> "We hold that, construed in its historical context, the command of Article I, Section 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."

and in concluding its opinion, at page 18, the Court said:

> "While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our **Constitution's plain objective of making equal representation for equal numbers of people** the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us." (Emphasis supplied.)

Population equality of the districts is, therefore, the only permissible basis for congressional representative districting.

This Court in **Reynolds v. Sims**, 377 U. S. 533 (1964), in comparing apportioning of state legislatures with congressional representative districting, at page 577, said:

> "In **Wesberry v. Sanders**, *supra*, the Court stated that congressional representation must be based on population as nearly equal in population as is practicable. In implementing the basic constitutional principle of representative government as enunciated by the Court in **Wesberry**—equality of population among districts—some distinctions may well be made between congressional and state legislative representation . . . Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting."

Regardless of the words used to describe the permissible population variances between congressional districts, whether described as "as nearly equal as may be", "as nearly equal as practicable", "substantially equal", or "equal representation for equal numbers of people", the maximum population variance between districts in Missouri of 84,655 and the many variances nearly as great, 80,659, 79,648, 75,652, 72,082 and others (cited in **Table II** on page 27 of Appellants' "Jurisdictional Statement") are constitutionally not permissible in a state wherein low population political areas (such as precincts, wards, townships, and even counties) exist throughout the state which make population adjustments between districts a relatively simple matter. By any standard of equality of population, such variances between congressional representative districts are unconstitutional. Any claims, as advanced by Appellants, that such variances are permissible, are unsubstantial.

Appellants claim (in their "Jurisdictional Statement" in "Questions Presented", page 3, ¶ 4) that the District

Court found that there is an overvaluation and overweight of votes in the rural geographic areas as contrasted with the votes in metropolitan areas in the composition of congressional districts. Appellants claim that this conclusion of the Court is based, to some extent, on inaccuracies in certain facts stated and comparison of dissimilar fact situation.

The geographic location of the districts, whose population differences with other districts create unconstitutional disparities in the relative value and influence of the vote of the individual voters residing in different districts, is of no legal significance, hence the geographical location of a district presents an unsubstantial question.

Appellants draw attention to the District Court's inaccuracies in the statements of some facts (pages 3, 4, and 12 of their "Jurisdictional Statement"). The mistakes of the District Court are of little import. For example, it is obvoius that the Court was referring to the relative loss in population rather than to the change in population which was an increase, because the Court was merely indicating that the number of districts was reduced from eleven to ten (page 12). Again, in comparing the districting of Maryland with that of Missouri (page 12), the Court was comparing states with about the same number of districts, eight and ten, presenting a somewhat similar situation; the comparison for the purpose made is valid whether or not the population of Missouri was accurately stated. The Court may have been inaccurately stating some populations, obviously through the inadvertent transposition of some numbers, but such discrepancies are of no significance to the discusison of the particular points in question.

Appellees contend that, if Appellants considered that the inaccuracies of the District Court complained of by Appellants were of such magnitude that the inaccuracies

might have even remotely affected the conclusions of the Court or that the Court may have based its conclusions on such or other inaccurate data, Appellants could have and should have brought their claims to the District Court through a motion for a rehearing of the cause before the District Court.

No official records are taken by either house of the General Assembly (the Legislature) of Missouri of the debates or discussions presented on the floor nor are any records taken of the debates or discussions before any committees. Therefore, whether population was the principal factor considered by the Legislature, as Appellants claim (in their "Questions Presented", page 4, ¶5) cannot be ascertained or determined. The constitutionality of the 1965 Congressional Districting Act must be judged on its face alone and on the populations of the districts which it created.

The maximum variation of population of 84,655 (between the First and the Tenth districts) and other gross and excessive differences (cited in **Table II** on page 27 of Appellants' Jurisdictional Statement) of 80,659, 79,648, 75,652, 72,082, and many other lesser variances but still far from meeting acceptable standards, support the conclusion that the Legislature made an ineffective attempt to make the district populations equal so that the vote of the voter in one district would have an equal weight and influence equal to the vote of the voter in the other districts. The claim of Appellants that substantial equality in population of the districts has been attained is unsubstantial, in view of the gross and excessive differences in the district populations (cited in **Table II**).

There is no inaccuracy or doubt possible concerning the gross and excessive population differences of 84,655, 80,659, 79,648, 75,652, 72,082 and many others (Table II). These variances between the populations of the districts

created by the 1965 Congressional Representative Redistricting Act of Missouri are clearly unconstitutional under **Article I, Section 2, of the United States Constitution** as construed by this Court in **Wesberry v. Sanders**, 374 U. S. 1.

Political stability, as suggested by Appellants, cannot be considered in determining that unconstitutional districts be retained in effect, nor can any other factor than district population equality be the criterion upon which the validity of the districting Act is judged.

The General Assembly of Missouri, which was elected in November 1966 from newly apportioned districts, will be convened early in January 1967 to adjourn on June 30, 1967. An early consideration and disposition by this Court of this motion to affirm the judgment and decree of the District Court could be of assistance to the General Assembly in its procedures and considerations of the issues herein involved.

Appellees pray the Court to affirm the judgment sought to be reviewed on appeal on the ground that it is manifest that the questions presented are so unsubstantial as not to need further argument.

Respectfully submitted,

PAUL W. PREISLER,
4274 Shenandoah Avenue,
Saint Louis, Missouri 63110,
Attorney for Appellees.